Statement

On May 22, 1963, the petitioner, an attorney, was indicted by the New York County grand jury and charged with conspiracy to bribe officials of the New York State Liquor Authority. On December 3, 1963, the petitioner instituted an original proceeding in the Appellate Division of the New York Supreme Court, pursuant to Section 5704 (a) of the New York Civil Practice Law and Rules [hereinafter CPLR], alleging that he had reason to believe that his premises had been and were being subjected to electronic eavesdropping by the respondent, and requesting an order (1) directing the respondent to disclose the existence of "any" *ex parte* court order authorizing such eavesdropping and (2) vacating such *ex parte* order (9-10).* Without affirming or denying the petitioner's allegations, the district attorney opposed the application on the ground that the remedy invoked was improper. The Appellate Division denied the motion without opinion, in a resettled order dated May 21, 1964 (12-13).

On application by the petitioner, the New York Court of Appeals granted leave to appeal (11). After reading the briefs and hearing argument, the Court of Appeals vacated the order granting leave to appeal in a four-to-three decision (see Petition for Certiorari, Appendix A). Of the four judges composing the majority, two held that the Appellate Division had no jurisdiction to entertain the petitioner's application and two held that the action of the Appellate Division was discretionary and therefore not reviewable by the Court of Appeals (*ibid.*).

* References, unless otherwise indicated, are to pages of the Record on Appeal to the Court of Appeals.

ARGUMENT

The petition fails to present a substantial federal question.

1. The question decided was one of state procedure.

The sole question presented to and decided by the New York Court of Appeals was whether a specific state procedure, the scope of which is determined by state statute, empowers the Appellate Division of the New York Supreme Court to inquire into the existence and validity of an *ex parte* court order authorizing eavesdropping, and if the Appellate Division has such power, whether it may in its discretion decline to exercise it if other remedies are available. A majority of the court held either that "the Appellate Division had no jurisdiction to entertain in the first instance the application addressed to the orders for eavesdropping under CPLR 5704" or that the "action of the Appellate Division in this proceeding [was] purely discretionary" (see Petition for Certiorari, pp. 4a, 10a). Thus, it is manifest that no federal question was decided.

The various questions relating to the constitutionality of Section 813(a) of the New York Code of Criminal Procedure, posed in the petition for certiorari, were not decided by the New York court, precisely because the procedure invoked by the petitioner was inappropriate for raising them. While three members of the court were of the view that Section 5704(a) of the Civil Practice Law and Rules should be broadly construed, to permit consideration of the questions raised by the petitioner, their views did not prevail.

2. The petitioner had other remedies under state law.

Nor does the instant case raise the question whether the constitution obligates a state to provide a remedy to one who claims violation of his constitutional rights, since the petitioner in the instant case had such a remedy. At the time he instituted the proceeding in the Appellate Division he was already under indictment.* If evidence obtained by means of electronic eavesdropping were offered at the trial, he could test the constitutionality of the methods used to obtain it by objecting to its admission. *People* v. *McCall,* —— N. Y. 2d —— (1966) (opinion of the New York Court of Appeals not yet published). Federal procedure similarly provides for a hearing at the trial, when it becomes evident that evidence allegedly obtained through wire tapping, directly or indirectly, will be used, *Nardone* v. *United States,* 308 U. S. 338 (1939), and does not allow an exploratory motion prior thereto. *United States* v. *Pardo-Bollan,* 229 F. Supp. 473 (S. D. N. Y. 1964).

Moreover, totally apart from the criminal trial, if the petitioner had evidence to support his claim of trespass (Petition, pp. 23-4), he could have proceeded by a common law action of trespass against the person or persons who allegedly committed the trespass. If, on the other hand, there was no trespass, no federal right was violated since the mere interception of a communication, without disclosure of its contents, violates neither the Constitution, *Olmstead* v. *United States,* 277 U. S. 438 (1928), nor the Federal Communications Act, *Coplon* v. *United States,* 191 F. 2d 749, 759 (D. C. Cir. 1951).

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* The petitioner instituted another action prior to his indictment (Petition, pp. 9-12). However, that action was not reviewed in the New York appellate courts and is not before this Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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